American Bar Association
www.supremecourtpreview.org

No. 07-9995

IN THE
Supreme Court of the United States

MICHAEL RIVERA,
Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Illinois

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Of Counsel:
BARBARA BERGMAN
CO-CHAIR, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1117 Stanford, N.E.
Albuquerque, NM 87131
(505) 277-3304

ABIGAIL K. HEMANI
Counsel of Record
ANNE E. RAILTON
SARAH M. BURLESON
GOODWIN PROCTER LLP
620 Eighth Avenue
New York, NY 10018
(212) 813-8800

KEVIN P. MARTIN
GOODWIN PROCTER LLP
Exchange Place
53 State Street
Boston, MA 02109
(617) 570-1000

Counsel for *Amicus Curiae*

December 12, 2008

TABLE OF CONTENTS

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Peremptory Challenge Has Long Been Instrumental in Protecting Criminal Defendants' Constitutional Right to a Fair Trial by an Impartial Jury. 4

II. The Improper Denial of a Defendant's Peremptory Challenge Unconstitutionally Tips the Scales in Favor of the Prosecution. 15

III. The Improper Denial of a Defendant's Peremptory Challenge Cannot Be Deemed Harmless 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES:

Arizona v. *Fulminante*,
499 U.S. 279 (1991).....20

Davis v. *Georgia*,
429 U.S. 122 (1976).....3, 20

Edmonson v. *Leesville Concrete Co.*,
500 U.S. 614 (1991).....18

Fay v. *New York*,
332 U.S. 261 (1947.....3, 15

Georgia v. *McCollum*,
505 U.S. 42 (1992) .....*passim*

Gray v. *Mississippi*,
481 U.S. 648 (1987).....20

Hayes v. *Missouri,*
120 U.S. 68 (1887) 16, 17

Holland v. *Illinois*,
493 U.S. 474 (1990).....5, 15, 16

McIlwain v. *United States*,
464 U.S. 972 (1983).....20

Peters v. *Kiff*,
407 U.S. 493 (1972).....17

Pointer v. *United States*,
151 U.S. 396 (1894).....2, 4, 10

Ross v. *Oklahoma*,
487 U.S. 81 (1988) .....*passim*

Stilson v. *United States*,
250 U.S. 583 (1919).....15

Swain v. *Alabama*,
380 U.S. 202 (1965)..... *passim*

United States v. *Gonzalez-Lopez*,
548 U.S. 140 (2006)..... 20

United States v. *Martinez-Salazar*,
528 U.S. 304 (2000)..... *passim*

United States v. *McVeigh*,
918 F. Supp. 1467 (W.D. Okla. 1996)..... 11

Vasquez v. *Hillery*,
474 U.S. 254 (1986)..... 3, 20

Witherspoon v. *Illinois*,
391 U.S. 510 (1968)..... 3, 15, 16

STATUTES:

28 U.S.C. § 1870..... 8, 9

Act of Apr. 30, 1790,
ch. 9, § 30, 1 Stat. 112 4

Act of March 3, 1865,
ch. 86, § 2, 13 Stat. 500 5

Act of June 8, 1872,
ch. 333, § 2, 17 Stat. 282..... 4, 5

FEDERAL RULES:

Fed. R. Crim. P. 24..... *passim*

Ill. S. Ct. Rule 434..... 17

OTHER AUTHORITIES:

Frank P. Andreano, *Voir Dire: New Research Challenges Old Assumptions*,
95 Ill. B.J. 474 (Sept. 2007)..... 13, 14

4 William Blackstone, *Commentaries on the Laws of England* (1769)..... 4, 5

Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. Cal. L. Rev. 503 (1965).....12

Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 St. Mary's L.J. 575 (1985).....11, 12

3 Edward Coke, *Institutes of the Laws of England* (1644) 4

Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts, in* Inside the Juror: The Psychology of Juror Decision Making 42 (Reid Hastie ed., Cambridge Univ. Press 1993).....13, 14

Herald P. Fahringer, *In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case*, 43 Law & Contemp. Probs. 116 (1980) 11, 12

Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection*, 17 Ohio N.U. L. Rev. 229 (1990).....14

Valerie P. Hans & Alayana Jehle, *Avoid Bald Men and People With Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 Chi.–Kent L. Rev. 1179 (2003).....12

Len Lecci & Bryan Myers, *Individual Differences in Attitudes Relevant to Juror Decision Making: Development and Validation of the Pretrial Juror Attitude Questionnaire (PJAQ)*, 38 J. of Applied Soc. Psychol. 2010 (2008).....13

Joel D. Leiberman & Bruce D. Sales, *Scientific Jury Selection* 75 (2007).....14

Tamara Loomis, *Business Scandals Rock Juror Attitudes*, N.Y. L.J. Oct. 16, 2002, at A1.....14

James R.P. Ogloff & Neil Vidmar, *The Impact of Pretrial Publicity on Jurors: A Study to Compare the Relative Effects of Television and Print Media in a Child Sex Abuse Case*, 18 Law & Hum. Behav. 507 (1994).....12

William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 Am. Crim. L. Rev. 1391 (Fall, 2001).....4, 5, 6

John Proffatt, Treatise on Trial By Jury: Including Questions of Law and Fact (Wm. S. Hein Publishing 1986) (1877) 5

David B. Rottman & Shauna M. Strickland, Bureau of Justice Statistics, State Court Organization, 2004 (2006).....6, 7, 8, 9

Christopher E. Smith & Roxanne Ochoa, *The Peremptory Challenge in the Eyes of the Trial Judge*, 79 Judicature 185 (1996).....11

V. Hale Starr & Mark McCormick, Jury Selection 46 (3d ed. 2001).....10

Brian W. Wais, Note, *Actions Speak Loader than Words: Revisions to the Batson Doctrine and Peremptory Challenges in the Wake of Johnson v. California and Miller-El v. Dretke*, 45 Brandeis L.J. 437 (2007).....10

Mitzi S. White, *The Nonverbal Behaviors in Jury Selection*, 31 Crim. L. Bull. 414 (1995).....14

Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 Stan. L. Rev. 491 (1978).....12, 14

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 12,000 attorneys and nearly 40,000 affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practices, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL seeks to promote the proper and constitutional administration of justice, and to that end concerns itself with the protection of individual rights and the improvement of the criminal law, practices, and procedures. NACDL submits this brief in the hope that it may aid the Court in its consideration of the fundamental constitutional and societal interests that are implicated when a criminal defendant is improperly denied the right to exercise a peremptory challenge.

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

This case presents the question of whether the erroneous denial of a defendant's peremptory challenge, resulting in the sitting of a juror who otherwise would have been excused, requires automatic reversal or may be subject to a harmless error analysis. In light of the long-standing and significant role of the peremptory challenge in ensuring a defendant's right to a fair trial by an impartial jury, the answer to this question can only be that automatic reversal is mandated.

The peremptory challenge has long been a critical mechanism for protecting the right of criminal defendants, as guaranteed by the Sixth and Fourteenth Amendments, to a fair trial by an impartial jury. The defendant's right to challenge peremptorily dates back to British common law, and each and every jurisdiction within the United States has long-granted, and presently continues to grant, this right of challenge to the defense. The significance of the peremptory challenge is confirmed not only by its history, but also by empirical data, which suggests that potential jurors routinely fail—either consciously or subconsciously—to admit their biases. Accordingly, the peremptory challenge is not only a necessary supplement to the challenge for cause, but is "'one of the most important rights secured to the accused.'" *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965) (quoting *Pointer* v. *United States*. 151 U.S. 396, 408 (1894)).

This Court has commented on occasion that the peremptory challenge, although a "means to achieve the constitutionally required end of an impartial jury," is not itself "of a constitutional dimension." *United States* v. *Martinez-Salazar*, 528 U.S. 304, 307

(2000) (quoting *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988)). Regardless of whether peremptory challenges are constitutionally mandated, however, once a state determines to implement them, it plainly may not do so in a manner that "stack[s] the deck against the [defendant]" or otherwise promotes "a tribunal 'organized to convict.'" *Witherspoon* v. *Illinois*, 391 U.S. 510, 521, 523 (1968) (quoting *Fay* v. *New York*, 332 U.S. 261, 294 (1947)). Accordingly, where, as here, a trial court tilts the scales of the jury selection process in favor of the prosecution by improperly refusing to honor a defendant's peremptory challenge and empanelling a juror over his objection, such action necessarily violates the defendant's constitutional right to a fair trial by an impartial jury.

To be sure, the question presented in this case is not simply whether the improper refusal to honor a defendant's peremptory challenge is unconstitutional, but whether it requires automatic reversal. NACDL agrees with the Petitioner that such error can never be deemed harmless, and that reversal is therefore always required. Where, as here, "a petit jury has been selected upon improper criteria," this Court has repeatedly "required reversal of the conviction because the effect of the violation cannot be ascertained." *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986) (citing *Davis* v. *Georgia*, 429 U.S. 122 (1976) (*per curiam*)); see also *Swain*, 380 U.S. at 219 (stating that "a denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice"). As in these other cases, the impact of an improperly empanelled juror upon the deliberation process—and upon the ultimate verdict—is unknowable. Accordingly, the

error cannot be deemed harmless, and reversal must be automatic.

ARGUMENT

I. The Peremptory Challenge Has Long Been Instrumental in Protecting Criminal Defendants' Constitutional Right to a Fair Trial by an Impartial Jury.

1. A defendant's right to exercise peremptory challenges has long been regarded as a vital tool for ensuring a fair trial by an impartial jury. The peremptory challenge is "part of our common law heritage," dating back at least to the time of Blackstone. *Martinez-Salazar*, 528 U.S. at 311 (citing 4 William Blackstone, Commentaries *346–48 (1769)). A defendant's right to challenge peremptorily was extolled in England as necessary to ensure "an indifferent trial * * * which is required by law." *Pointer*, 151 U.S. at 408 (quoting Coke, 3 Co. Inst. 27, c. 2) ("'[T]o bar the party indicted of his lawful challenge is to bar him of a principal matter concerning his trial.'").

Following British common law, U.S. jurisdictions have long-afforded criminal defendants the right to exercise peremptory challenges. In the federal system, peremptory challenges were authorized by statute for treason and other capital offenses as early as 1790. See *Swain*, 380 U.S. at 214–15 (citing Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 112, 119). In 1872, Congress expanded this right, expressly mandating that defendants receive peremptory challenges in all felony and misdemeanor cases. See *Swain*, 380 U.S. at 214 n.14 (citing Act of June 8, 1872, ch. 333, § 2, 17 Stat. 282); see also William T.

Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 Am. Crim. L. Rev. 1391, 1414–15 (Fall, 2001).

As in the federal system, states have long afforded defendants peremptory challenges. As explained by this Court, "[t]he defendant's right of challenge [in the states] was early conferred by statute." *Swain*, 380 U.S. at 215. Indeed, by 1790, most states had codified the right to challenge for those charged with capital offenses. See Pizzi, *supra*, at 1415–16. By the mid-1800s numerous states had also granted peremptory challenges to criminal defendants charged with noncapital felonies and misdemeanors, either by statute or through common law. John Proffatt, Treatise on Trial By Jury: Including Questions of Law and Fact 209–11 (Wm. S. Hein Publishing 1986) (1877).[2]

---

[2] In contrast to this long-standing precedent of affording peremptory challenges to criminal defendants, the prosecution's ability to challenge has only evolved more recently. At the time of Blackstone, the "'privilege[] of peremptory challenges, though granted to the prisoner, [wa]s denied to the king.'" *Holland* v. *Illinois*, 493 U.S. 474, 519 n.15 (1990) (Marshall, J., dissenting) (quoting 4 William Blackstone, Commentaries *346–347 (1769)). In the United States, it was not until 1865 that Congress enacted legislation affording the right of challenge to federal prosecutors. See Act of March 3, 1865, ch. 86, § 2, 13 Stat. 500. Likewise, most states did not enact laws extending the right of challenge to the prosecution until the second half of the Nineteenth Century. See Pizzi, *supra*, at 1415–16. Indeed, "the two most populous States in the Nation's first century, New York and Virginia, did not permit the prosecutor peremptory challenges until 1881 and 1919 respectively." *Holland*, 493 U.S. at 519 (Marshall, J., dissenting) (citations omitted).

As has been the case throughout recent history, every jurisdiction in the United States presently affords criminal defendants the right to exercise peremptory challenges. See Pizzi, *supra*, at 1416. Although the number and applicability of peremptory challenges varies from one jurisdiction to another (and within jurisdictions for different types of charges), several patterns emerge which suggest that the primary purpose of the peremptory challenge is to protect a criminal defendant's constitutional right to a fair trial by an impartial jury.

First, in many jurisdictions, the prosecution is granted considerably fewer peremptory challenges than the defense. *Ibid*. For example, Federal Rule of Criminal Procedure 24(b)(2) grants non-capital felony defendants 10 peremptory challenges, while allowing the government only 6.[3] Likewise, numerous states afford more challenges to the defendant than to the government, at least in certain types of cases. See David B. Rottman & Shauna M. Strickland, Bureau of Justice Statistics, State Court Organization, 2004, 228–31, Table 41 (2006) (collecting rules regarding the use of peremptory challenges in all U.S. jurisdictions), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf.[4] No

---

[3] In capital cases and in misdemeanor cases, the government and the defendant are entitled to equal numbers of peremptory challenges. See Fed. R. Crim. P. 24(b)(1),(3).

[4] States giving more peremptory challenges to the defense include: Arkansas (two more challenges than the government in capital and felony cases); Delaware (eight more challenges than the government in capital cases); Georgia (double the number of government challenges in capital, felony, and misdemeanor

(*continued next page*)

criminal justice system within the United States affords more peremptory challenges to the prosecution than to the defense, under any circumstances. *Ibid.*

Second, defendants are almost universally granted additional peremptory challenges in more serious cases. Federal courts and most state courts provide substantially more challenges to defendants charged with a felony than to those facing only misdemeanor charges, and substantially more challenges to defendants charged with a capital crime than to those facing lesser felony charges. See Fed. R. Crim. P. 24(b) (granting capital defendants 20 peremptory challenges, other felony defendants 10 peremptory challenges, and misdemeanor defendants 3 peremptory challenges); Rottman & Strickland, *supra*, 228–31, Table 41 (evidencing that 40 states afford more peremptory challenges to some or all felony defendants than to misdemeanor defendants, and that 35 states afford additional peremptory challenges to defendants charged with a capital crime). Indeed, many jurisdictions afford at

---

cases); Maryland (double the number of government challenges in capital and felony cases); Minnesota (six more challenges than the government where defendant faces life imprisonment; two more in all other felony and misdemeanor cases); New Hampshire (double the number of government challenges in capital cases); New Jersey (eight more challenges than the government in capital cases and for specified other serious crimes); New Mexico (four more challenges than the government in capital cases; two more in felony and misdemeanor cases); South Carolina (double the number of government challenges in capital and felony cases); and West Virginia (three times the number of government challenges in felony cases). See Rottman & Strickland, *supra*, 228, Table 41.

least twice as many peremptory challenges to defendants charged with more serious crimes. *Ibid*.[5]

Third, in virtually every jurisdiction within the United States, the number of peremptory challenges afforded to criminal defendants exceeds the number granted to parties to a civil action. *Swain*, 380 U.S. at 217. In federal cases, while criminal defendants facing felony charges receive either ten or twenty peremptory challenges, see Fed. R. Crim. P. 24(b), in civil matters each party receives only three, see 28

---

[5] States granting felony defendants at least twice the number of challenges available in misdemeanor cases include: Alabama; Alaska; Arkansas; California (for felonies punishable by life imprisonment); Connecticut; District of Columbia; Florida; Georgia; Idaho (for felonies punishable by life imprisonment); Indiana; Kansas; Kentucky; Maine; Maryland; Massachusetts (for felonies punishable by life imprisonment); Michigan (for felonies punishable by life imprisonment); Minnesota (for felonies punishable by life imprisonment); Missouri; Nebraska; New Hampshire (for defendants charged with first degree murder); New Jersey (double the number of misdemeanor challenges for the *defendant only*); New York (for Class A felonies); Rhode Island; South Dakota; Tennessee; Texas; Washington; and Wyoming. States granting capital defendants at least twice the number of challenges available in non-capital felony cases include: Alabama; California (as compared to felonies not punishable by life imprisonment); Colorado; Connecticut (as compared to felonies not punishable by life imprisonment); Delaware; Illinois; Indiana; Kansas (as compared to most felonies); Louisiana (as compared to felonies punishable "without hard labor"); Maryland; Mississippi; Nebraska; New Hampshire (as compared to all felonies except first degree murder); New Mexico; New York (as compared to all but Class A, B, or C felonies); North Carolina; Oregon; Pennsylvania; South Dakota (as compared to felonies not punishable by life imprisonment); Utah; Washington. Rottman & Strickland, *supra*, 228–31, Table 41.

U.S.C. § 1870. Similarly, 46 of the 50 states grant more challenges to felony defendants than to parties in civil cases. Rottman & Strickland, *supra*, at 228–31, Table 41.[6]

Finally, for trials involving more than one criminal defendant, the vast majority of U.S. jurisdictions provide a mechanism for affording the defense additional peremptory challenges. See Fed. R. Crim. P. 24(b) (authorizing courts to grant additional challenges to multiple defendants and leaving it up to the defendants whether to split their challenges or exercise them jointly); Rottman & Strickland, *supra*, 228–31, Table 41 (noting that at least 40 of the 50 states afford additional peremptory challenges to the defense in cases involving multiple defendants).[7]

---

[6] States granting felony defendants more peremptory challenges than parties to a civil case include: Alaska; Arizona; Arkansas; California; Colorado; Connecticut; Delaware; District of Columbia; Florida; Georgia; Hawaii (for felonies punishable by life imprisonment); Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana (for felonies punishable "with hard labor"); Maine; Maryland; Massachusetts (for felonies punishable by life imprisonment); Michigan; Minnesota; Mississippi; Missouri; Montana; Nebraska; New Hampshire (for first degree murder); New Jersey; New York; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Texas; Utah; Virginia; Washington; West Virginia; Wisconsin; Wyoming.

[7] States granting additional peremptory challenges for multiple defendants include: Alabama; Alaska; Arizona; California; Colorado; Delaware; Florida; Georgia; Idaho; Illinois; Kansas; Kentucky; Louisiana; Maine; Maryland; Massachusetts; Michigan; Minnesota; Missouri; Montana; Nebraska; New Hampshire; New Jersey; New Mexico; North

(*continued next page*)

In sum, "[t]he persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury" and "'one of the most important rights secured to the accused.'" *Swain*, 380 U.S. at 219 (quoting *Pointer*, 151 U.S. at 408).

2. The fact that each and every U.S. jurisdiction has embraced the use of peremptory challenges is not surprising: Evidence suggests that such challenges are, in fact, necessary to weed out jurors who cannot be impartial.

Although courts in every jurisdiction may excuse "for cause" any potential juror who openly expresses a lack of partiality, see, *e.g.*, Brian W. Wais, Note, *Actions Speak Loader than Words: Revisions to the Batson Doctrine and Peremptory Challenges in the Wake of Johnson v. California and Miller-El* v. *Dretke*, 45 Brandeis L.J. 437, 437–38 (2007) (citing V. Hale Starr & Mark McCormick, Jury Selection 46 (3d ed. 2001)), the for-cause challenge does not eliminate those members of the jury pool who are either unwilling or unable to admit their bias. As explained by Chief Judge Richard P. Matsch in connection with the Timothy McVeigh case:

> The existence of * * * prejudice is difficult to prove. Indeed it may go unrecognized in those who are affected by it. The prejudice that may deny a fair trial is not limited to a bias or

---

Carolina; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Texas; Utah; Vermont; Washington; West Virginia; Wisconsin; Wyoming.

> discriminatory attitude. It includes an impairment of the deliberative process of deductive reasoning from evidentiary facts resulting from an attribution to something not included in the evidence.

United States v. *McVeigh*, 918 F. Supp. 1467, 1472 (W.D. Okla. 1996). In other words, each person's individual life circumstances may impede—either consciously or subconsciously—his or her ability to objectively consider the evidence presented. Because life circumstances that affect partiality do not always translate into cause for dismissal, the peremptory challenge is a vital mechanism for ensuring that defendants receive a fair trial, free from juror bias.[8]

Studies have shown that two-thirds of the individuals on most jury panels in criminal cases are biased in some way against the accused. See, *e.g.*, Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 St. Mary's L.J. 575, 580 (1985) (citing Herald P.

---

[8] In a 1995 survey, more than eighty-five percent of federal district court judges agreed that peremptory challenges make a "beneficial contribution to the attainment of fair trials and just outcomes." Christopher E. Smith & Roxanne Ochoa, *The Peremptory Challenge in the Eyes of the Trial Judge*, 79 Judicature 185, 186 (1996). Surveyed judges recognized that peremptory challenges are useful for eliminating potential jurors who do not "manifest the overt biases necessary to support a challenge for cause," but who are nevertheless unable to remain impartial. *Ibid.* at 188. Additionally, as explained by Justice Souter, because "[t]he resolution of juror-bias questions is never clear cut * * * it may well be regarded as one of the very purposes of peremptory challenges to enable the defendant to correct judicial error on the point." *Martinez-Salazar*, 528 U.S. at 319 (Souter, J., concurring).

Fahringer, *In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case*, 43 Law & Contemp. Probs. 116, 122 (1980)). Indeed, as many as twenty five percent of jurors begin their service with the belief that the defendant must be guilty simply because he was charged. See Covington, *supra*, at 580 (citing Fahringer, *supra*, at 123). Nevertheless, jurors regularly fail, either intentionally or unintentionally, to openly acknowledge such prejudice during the *voir dire* process. See, *e.g.*, Valerie P. Hans & Alayana Jehle, *Avoid Bald Men and People With Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 Chi.–Kent L. Rev. 1179, 1187 (2003) (citing Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. Cal. L. Rev. 503, 505 (1965) (finding that jurors intentionally withhold information suggesting bias)); James R.P. Ogloff & Neil Vidmar, *The Impact of Pretrial Publicity on Jurors: A Study to Compare the Relative Effects of Television and Print Media in a Child Sex Abuse Case*, 18 Law & Hum. Behav. 507, 521–22 (1994) (finding that jurors are often unaware of subconscious biases); Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 Stan. L. Rev. 491, 531 (1978) (concluding that "[p]otential jurors may hide their prejudices from the examiner, either consciously or unconsciously"). Accordingly, many jurors that do, in fact, harbor bias against the defendant will not be excused for cause.[9]

---

[9] This problem was expressly acknowledged by Justice Thomas in *Georgia* v. *McCollum*, 505 U.S. 42 (1992). As

(*continued next page*)

In order to remedy this problem, defense counsel must ascertain indirect evidence of juror partiality and make use of his or her peremptory challenges accordingly. Although the beliefs, attitudes and experiences that may correlate with juror bias vary from case to case, studies suggest several categories of individuals that are more likely to disfavor the accused.[10] These categories include those who have favorable views of law enforcement; those who have a high degree of confidence in the criminal justice system; those with a desire for order, well-defined rules, and authoritative leadership; those who are in favor of capital punishment; those who are politically conservative; and those who have been exposed to media coverage of the case. See, *e.g.*, Len Lecci & Bryan Myers, *Individual Differences in Attitudes Relevant to Juror Decision Making: Development and Validation of the Pretrial Juror Attitude Questionnaire (PJAQ)*, 38 J. Applied Soc. Psychol. 2010, 2019, 2031 (2008); Frank P. Andreano, *Voir Dire: New Research Challenges Old Assumptions*, 95

---

explained by Justice Thomas, absent the opportunity to consider race in exercising peremptory challenges, defendants will be unable to "protect[] themselves" against the "racial animus" of those jurors who do not "actually admit prejudice during *voir dire*." *Ibid*. at 61–62 (Thomas, J., concurring in judgment).

[10] Scholars have theorized that juror beliefs, attitudes and experiences influence three components of the deliberative process: the evaluation of witnesses, the inferences made that go beyond evidence presented, and the nature of the juror's "personal standard-of-proof" for conviction. Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts, in* Inside the Juror: The Psychology of Juror Decision Making 42, 58 (Reid Hastie ed., Cambridge Univ. Press 1993).

Ill. B.J. 474, 477 (Sept. 2007); Joel D. Lieberman & Bruce D. Sales, *Scientific Jury Selection* 75, 80 (2007); Tamara Loomis, *Business Scandals Rock Juror Attitudes*, N.Y. L.J. Oct. 16, 2002, at A1; Ellsworth, *supra*, at 46, 57; Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?*, 17 Ohio N.U. L. Rev. 229, 245, 248 (1990). Additionally, the mannerisms, tone and demeanor of individual panel members may be useful to defense counsel in evaluating possible juror bias. See, *e.g.*, Mitzi S. White, *The Nonverbal Behaviors in Jury Selection*, 31 Crim. L. Bull. 414, 428–44 (1995).

Of course, each of these considerations is necessarily an imperfect proxy for determining partiality. Nevertheless, studies suggest that the exercise of peremptory challenges by defense counsel does, in fact, reduce the number of seated jurors who are predisposed to convict. See, *e.g.*, Zeisel & Diamond, *supra*, at 517–19 (finding that, "on the average, defense attorneys shifted in their favor the proportion of not guilty votes in the venire" through the exercise of peremptory challenges).[11] Because at

---

[11] In this study conducted by Zeisel and Diamond, peremptorily excused jurors from twelve federal criminal trials were asked to remain as shadow jurors. The researchers then compared the initial votes cast by the jury members prior to deliberation with those cast by the group of individuals who would have been seated, absent the peremptory challenges. In five of the twelve cases, although the actual jury voted to acquit, the votes cast by the mock jurors suggested that convictions would have been far more likely if no peremptory challenges had been exercised. *Ibid*. at 507–08.

least some of these challenged jurors are likely to harbor undisclosed bias sufficient to give rise to constitutional concerns, the peremptory challenge plays an important role "in reinforcing a defendant's right to trial by an impartial jury." *Martinez-Salazar*, 528 U.S. at 311.

II. The Improper Denial of a Defendant's Peremptory Challenge Unconstitutionally Tips the Scales in Favor of the Prosecution.

This Court has made clear that the constitutional guarantee of an impartial jury "deprives the State of the ability to 'stack the deck' in its favor" during the jury selection process. *Holland* v. *Illinois*, 493 U.S. 474, 481 (1990). Thus, whatever procedures a state may put in place for jury selection, it must ensure that "a fair hand is dealt" to the defense. *Ibid*. A state may not conduct jury selection in a manner that "stack[s] the deck against the [defendant]" or otherwise promotes "a tribunal 'organized to convict.'" *Witherspoon* v. *Illinois*, 391 U.S. 510, 521, 523 (1968) (quoting *Fay* v. *New York*, 332 U.S. 261, 294 (1947)); see also *Holland*, 493 U.S. at 481 (noting constitutional requirement that "in the process of selecting the petit jury the prosecution and defense will compete on an equal basis").

This Court has commented on occasion that peremptory challenges, although a "means to achieve the constitutionally required end of an impartial jury," are not themselves "of constitutional dimension." *Martinez-Salazar*, 528 U.S. at 307 (quoting *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988)); see also *Stilson* v. *United States*, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant

peremptory challenges to defendants in criminal cases.").[12] While the states may not be constitutionally required to grant peremptory challenges, however, once they determine to do so, they must ensure that "[b]etween [the defendant] and the state the scales are [] evenly held." *Hayes* v. *Missouri*, 120 U.S. 68, 70 (1887); *Swain*, 380 U.S. at 220 (same); cf. *Holland*, 493 U.S. at 483 (noting with respect to peremptory challenges that "neither the defendant nor the State should be favored"); *Witherspoon*, 391 U.S. at 520 n.15 (holding that, while the state *could have* mandated capital punishment for all persons convicted of certain crimes, once it chose to submit this matter to a jury, it was constitutionally required to ensure that the sentencing jury was selected in an even-handed manner).[13]

Thus, a defendant's constitutional right to a fair trial by an impartial jury may still be "denied or

---

[12] Although acknowledging this past precedent, this Court has recently stated that "[t]he constitutional phrase 'impartial jury' must surely take its content from th[e] unbroken tradition" of the peremptory challenge and, therefore, that "[o]ne could plausibly argue * * * that the requirement of an 'impartial jury' impliedly *compels* peremptory challenges." *Holland*, 493 U.S. at 481–82 (emphasis in original). Although NACDL agrees with this argument, because the Court need not reexamine its past precedent in order to a find constitutional error in this case, there is no need to expound upon it.

[13] Of course, to the extent that the scales may be tipped, the Constitution requires that they tilt in the defendant's favor. See, *e.g.*, *McCollum*, 505 U.S. at 68 (O'Connor, J., dissenting) ("The concept that the government alone must honor constitutional dictates [] is a fundamental tenet of our legal order" and "is particularly so in the context of criminal trials").

impaired [] if the defendant does not receive that [for] which state law provides." *Ross*, 487 U.S. at 89, 91. In this case, by improperly denying the Petitioner his lawful right to exclude a particular juror, the trial court tipped the scales of the jury selection process in favor of the state. Under Illinois law, the prosecutor and the Petitioner were each entitled to peremptorily challenge any seven panel members. See Ill. S. Ct. Rule 434(d). Although the state retained its authority to excuse the seven potential jurors that it considered most likely to harbor prejudice against it, by ordering Ms. Gomez to be seated, the trial court denied Mr. Rivera this same opportunity. The lack of "procedural parity" created by the Court's improper reverse-*Batson* ruling thus unconstitutionally "tilt[ed]" the process against the defendant, *Ross*, 487 U.S. at 94, 97 (Marshall, J., dissenting), creating a situation in which, "[b]etween [the defendant] and the state the scales [were not] evenly held," *Hayes*, 120 U.S. at 70.[14]

To be sure, this Court has on one prior occasion limited a defendant's constitutional right to make use of the peremptory challenges afforded him: In *Georgia* v. *McCollum*, 505 U.S. 42 (1992), this Court ruled that a defendant may not exercise peremptory challenges for the purpose of racial discrimination. But in *McCollum* this Court was faced with a

---

[14] Whether or not Ms. Gomez was, in fact, biased against Petitioner is of no import: "[E]ven if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias." *Peters* v. *Kiff*, 407 U.S. 493, 502 (1972) (citing cases).

situation in which the defendant's peremptory right came into conflict with the potential jurors' equal protection right not to be excluded from jury service on the basis of race. This Court chose to prioritize the equal protection right, explaining that "if race stereotypes are the price for acceptance of a jury panel as fair, * * * such a price is too high to meet the standard of the Constitution." *Ibid.* at 57 (quoting *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 630 (1991)). But the *McCollum* Court in no way suggested that the Constitution fails to protect a defendant's right to even-handedness in the exercise of peremptory challenges where, as here, the reverse-*Batson* ruling was made in error and, therefore, no equal protection right is at stake.[15]

Nor is this case analogous to *Ross* and *Martinez-Salazar*, two cases in which this Court declined to find constitutional or statutory error where the trial court's erroneous denial of a for-cause challenge compelled the defendant to challenge peremptorily, "thereby reducing his allotment of peremptory challenges by one." *Martinez-Salazar*, 528 U.S. at 315. In those cases, the Court expressly rested its decision on the fact that the defendants had a choice either to use a peremptory challenge to remove the juror that should have been excused for cause, or to "let[] [him] sit on the petit jury and, upon conviction, pursu[e] a Sixth Amendment challenge on appeal." *Ibid.* The Court reasoned that, while this may have

---

[15] Moreover, at the time it decided *McCollum*, this Court had already ruled in *Batson* that the state may not exercise peremptory challenges on the basis of racial discrimination. Accordingly, the decision in *McCollum* in no way placed the defendant at a disadvantage vis-à-vis the state.

been a difficult choice, "[a] hard choice is not the same as no choice." *Ibid.* Because each defendant (1) chose to challenge the biased juror, and (2) made no claim of partiality with respect to "the jurors who actually sat," *Ross*, 487 U.S. at 84, the Court held that each had received "all he was entitled to under [applicable law]," *Martinez-Salazar*, 528 U.S. at 315.

Unlike the defendants in *Ross* and *Martinez-Salazar*, Mr. Rivera had no choice: The trial judge refused to let him exercise a peremptory challenge against Ms. Gomez and, instead, insisted that she sit on the jury. Accordingly, Mr. Rivera did, in fact, make a claim of partiality with respect to a juror "who actually sat," *Ross*, 487 U.S. at 84, and the court's refusal to honor his challenge did, in fact, deprive him of "all he [wa]s entitled to" under the law, *Martinez-Salazar*, 528 U.S. at 315.

In sum, even if peremptory challenges are not expressly mandated by the Constitution, once a state elects to grant criminal defendants the right to challenge peremptorily, it may not constitutionally withhold or impede such challenges in a manner that tilts the scales of the jury selection process in favor of the prosecution. Accordingly, the trial court's refusal to honor one of Mr. Rivera's state-granted challenges violated his right to an impartial jury and to due process of law, as guaranteed by the Sixth and Fourteenth Amendments.

III. The Improper Denial of a Defendant's Peremptory Challenge Cannot Be Deemed Harmless.

As explained at length by Petitioner, automatic reversal is required in this case because the

improper empanelling of a juror is a "structural defect" that "'affec[ts] the framework within which the trial proceeds,' and [is] not 'simply an error in the trial process itself.'" *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148–49 (2006) (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 309–10 (1991).

Even if the error in this case could theoretically be subjected to harmless error analysis, however, such an analysis could not be implemented in practice. "[W]hen a petit jury has been selected upon improper criteria," this Court has repeatedly stated that reversal is necessary "because the effect of the violation cannot be ascertained." *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986) (citing *Davis* v. *Georgia*, 429 U.S. 122 (1976) (*per curiam*)); see also *Gray* v. *Mississippi*, 481 U.S. 648, 666–68 (1987). This is true even where, as here, only one juror was improperly seated or excluded as a result of the error. See *Davis*, 429 U.S. at 122–23 (requiring automatic reversal where "one prospective juror had been excluded [improperly]"). As explained by Justice Marshall, "[g]iven the delicate dynamics of jury deliberations, it is simply impossible to know the effects that [one juror] had on her fellow jurors." *McIlwain* v. *United States*, 464 U.S. 972, 975–76 (1983) (Marshall, J., dissenting from denial of certiorari). Indeed, "one juror may be the difference between liberty and imprisonment." *Ibid.* at 975.

Nothing about this Court's decision in *Martinez-Salazar* alters this analysis. Although the majority in *Martinez-Salazar* questioned whether "a denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice," *Martinez-Salazar*, 528 U.S. at 316 n.4 (quoting *Swain*, 380 U.S. at 219) (alterations in

original), it did not, in fact, have occasion to decide that issue. Instead, *Martinez-Salazar* held that *no error* resulted where a defendant used up one of his peremptory challenges to remedy an erroneous denial of a for-cause challenge. Moreover, this Court made clear in *Martinez-Salazar* that, had the court's error "result[ed] in the seating of any juror who should have been dismissed * * *" that "circumstance would require reversal." *Martinez-Salazar*, 528 U.S. at 316 (citing *Ross*, 487 U.S. at 85). In other words, *Martinez-Salazar* actually confirms that where, as here, a particular juror is erroneously empanelled, the error cannot be deemed harmless, and reversal must be automatic.

CONCLUSION

The peremptory challenge has long-been considered a necessary tool for ensuring a criminal defendant's constitutional right to a fair trial by an impartial jury. The improper empanelling of a juror whom the defendant sought to challenge undermines this constitutional right by tilting the scales of the jury selection process in favor of the state. Because there is simply no way to determine how the wrongly empanelled juror may have affected deliberations and, ultimately, the verdict, the erroneous denial of a defendant's peremptory challenge necessitates automatic reversal.

Respectfully submitted,

Of Counsel:
BARBARA BERGMAN
CO-CHAIR, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1117 Stanford, N.E.
Albuquerque, NM 87131
(505) 277-3304

ABIGAIL K. HEMANI
Counsel of Record
ANNE E. RAILTON
SARAH M. BURLESON
GOODWIN PROCTER LLP
620 Eighth Avenue
New York, NY 10018
(212) 813-8800

KEVIN P. MARTIN
GOODWIN PROCTER LLP
Exchange Place
53 State Street
Boston, MA 02109
(617) 570-1000

Counsel for Amicus Curiae

December 12, 2008